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1 **Phoenix, Arizona**
2 **October 24, 2011**

3 (Proceedings convened at 10:38 a.m.)

4 THE COURT: Thank you. Please be seated.

5 I'll ask the clerk to call the next matter, please. 10:39:35

6 THE COURTROOM DEPUTY CLERK: Criminal Case 11-126,
7 United States versus Avila, et al. This is the time set for a
8 status conference. Please announce your presence and if your
9 client is present.

10 MR. HARRIGAN: Good morning, Your Honor. Shane 10:39:50
11 Harrigan, Timothy Couglin and Mark Conover on behalf of the
12 United States.

13 THE COURT: All right. Good morning.

14 MR. COUGLIN: Good morning, Your Honor.

15 MS. SHOEMAKER: Good morning, Your Honor. Candice 10:39:58
16 Shoemaker for Mr. Avila. He's present in custody this
17 morning.

18 THE COURT: All right. Good Morning.

19 MR. HAMBY: Good morning, Your Honor. Joey Hamby for
20 Hector Carlon, Number 2. He's present out of custody standing 10:40:07
21 in the back of the courtroom.

22 THE COURT: All right. Good morning.

23 MR. LOCKHART: Good morning, Your Honor. David
24 Lockhart appearing for Dejan Hercegovac. He is out of
25 custody. He is not present, Your Honor. I ask that I be able 10:40:16

1 to waive his presence due to my inability to contact him in a
2 timely manner.

3 THE COURT: Very well. Good morning.

4 MR. BERARDONI: Good morning, Your Honor. Mark
5 Berardoni on behalf of Julio Jose Carrillo, who is present and 10:40:26
6 out of custody.

7 THE COURT: All right. Good morning.

8 MR. PAIGE: Good morning, Your Honor. Mark Paige on
9 behalf of Erick Davila, who is present. And I'm standing in
10 for Phil Noland with Mr. Chambers, who is also present. 10:40:34

11 THE COURT: All right. Thank you. Good morning.

12 MR. SELOW: Good morning, Your Honor. Philip
13 Seplov. I represent Jonathan Fernandez. He does contact me
14 every week but he's not here today. And with the Court's
15 permission, I'd also like to stand in for Michael Reeves for 10:40:47
16 Mr. Ponce, and I don't believe he's here.

17 THE COURT: Very well. Thank you.

18 MR. TATE: Good morning, Your Honor. Loyd Tate on
19 behalf of Danny Morones, who is present, Judge. He's standing
20 in the back with the red and white shirt on. 10:40:59

21 THE COURT: All right. Good morning.

22 MR. MITCHELL: Good morning, Your Honor. Tyrone
23 Mitchell for Joshua Moore, who is not present and we ask to
24 waive his appearance for today's hearing.

25 THE COURT: Good Morning. 10:41:11

1 MR. FLORENCE: Good morning, Your Honor. Henry
2 Florence for Sean Steward, who is present.

3 THE COURT: All right. Good Morning.

4 MR. INIGUEZ: Good morning, Your Honor. Baltazar
5 Iniguez appearing on behalf of Jacob Montelongo, who is not
6 present, Your Honor. I'd ask that his presence be waived for
7 this hearing.

10:41:18

8 THE COURT: Thank you. Good morning.

9 MR. BURNS: Good morning, Your Honor. Kevin Burns
10 appearing for John Rowland. He is also not present this
11 morning and I'd ask that his presence be waived.

10:41:27

12 THE COURT: Thank you. Good morning.

13 MR. CROWE: Good morning, Your Honor. Tom Crowe on
14 behalf of Kristi Ireland, and we would request leave of Court
15 to waive her presence as well.

10:41:41

16 THE COURT: All right. Good morning.

17 MS. WILLIAMS: Good morning, Your Honor. Anne
18 Williams appearing on behalf of Jose Polanco, who is present
19 out of custody in the back of the courtroom.

20 THE COURT: Good morning.

10:41:51

21 MR. SIMPSON: Sir, good morning. Alan Simpson. I'm
22 present with my client, Manuel Acosta, who stands behind me.

23 THE COURT: All right. Good morning.

24 MR. ERIKSSON: Good morning, Your Honor. Magnus
25 Eriksson here for Mr. Juan Martinez-Gonzales, who is seated

10:42:00

1 next to the interpreter.

2 THE COURT: Good morning.

3 MR. EISENBERG: Good morning, Your Honor. It's hard
4 to get a word in. David Eisenberg on behalf of Alfredo Celis.
5 He is in the back of the courtroom. He is present in the
6 second row from the back.

10:42:12

7 I'm also standing in for Mr. Park, who couldn't be
8 here because of his operation. He represents Kenneth
9 Thompson. I've tried to locate Mr. Thompson in the courtroom.
10 I know he's on release. He is not here. So I can't avow to
11 the Court whether contact was made with him.

10:42:27

12 THE COURT: All right. Thank you.

13 MR. EISENBERG: And I ask that his presence be
14 waived.

15 THE COURT: Very well.

10:42:37

16 MR. EISENBERG: Thank you.

17 MR. MARQUEZ: Good morning, Your Honor. Eugene
18 Marquez on behalf of Mr. Uriel Patino. He is out of custody
19 and I would ask that his presence be waived also.

20 THE COURT: Very well. Good morning.

10:42:48

21 All right. Did I overlook anyone?

22 All right. You may -- I was going to say you may be
23 seated but I'm not sure where that would be for some of you.

24 All right. This is a status hearing that is also a
25 hearing on the motion for continuance of the trial date and

10:43:17

1 pretrial motion dates and for order excluding time under the
2 Speedy Trial Act.

3 There is filed a motion by the -- and that is the
4 motion by the Government -- seeking the continuance that I
5 made reference to as well as a finding that the case be
6 treated and deemed a complex case.

10:43:40

7 Let me first ask the Government, based on the current
8 status of the case and the current number of defendants, how
9 long the Government is estimating its case will take.

10 MR. HARRIGAN: A month, Your Honor.

10:44:10

11 THE COURT: A month?

12 MR. HARRIGAN: Yes.

13 THE COURT: All right. Thank you.

14 All right. I will grant the motion to designate the
15 case as complex and so find.

10:44:29

16 Now, then, the motion to continue carries with it a
17 statement by the Government that, quote, the parties have
18 agreed that an additional continuance of the trial date to no
19 later than June 2012 is warranted under the Speedy Trial Act.

20 And Miss Shoemaker, let me just ask you, is this a
21 correct representation and by not filing anything in
22 opposition does this constitute your joinder in the motion for
23 a continuance not later than June 2012?

10:45:09

24 MS. SHOEMAKER: Yes, Judge, I would agree with that
25 statement, the only caveat being several members of defense

10:45:37

1 counsel did have an opportunity to meet with the Government a
2 few weeks ago. At that time we discussed dates. I personally
3 am out of the country until June 16th so I would prefer, in
4 case any last-minute issues come up, to go one week later than
5 the Government is suggesting in this case. But absolutely,
6 Mr. Avila does not have any objection and does join in the
7 motion to continue and we will waive any time required.

10:45:59

8 THE COURT: Very well.

9 Now, before -- I'm going to ask another question of
10 all defense counsel. Let me tell you what my plan is and what
11 the options are.

10:46:12

12 I am prepared -- subject to ensuring that there is no
13 objection and that all counsel does join in this motion, I am
14 prepared to grant it in part and deny it in part, and by that
15 I mean I'm prepared to continue the case to a trial date of
16 May 8, May 8 of 2012, and then if there is to be -- and I'm
17 not suggesting there should be or will be, but if there is
18 then to be any further motion for continuance the parties will
19 have to understand that they will have to seek a continuance
20 to and through September 25 of 2012, because I am going to be
21 in a patent case from July -- at least July until September.

10:46:40

10:47:22

22 So I want to make sure that is abundantly clear.

23 But what I'm prepared to do today is to grant the
24 motion to continue to a trial date of May 8 of 2012, and then
25 I will follow today's hearing with some specific dates with

10:48:04

1 respect to discovery and motion deadline, et cetera.

2 With that background, let me again just query defense
3 counsel. Is there any defense counsel that does not join in
4 the motion to continue and/or otherwise wants to be heard in
5 opposition thereto?

10:48:37

6 MR. HAMBY: Your Honor, this is Joey Hamby for Mr.
7 Carlon.

8 Your Honor, at the time that these dates were
9 circulated I was in agreement with them. That was based on my
10 understanding that there were approximately two terabytes of
11 video data that were going to be disclosed to us. Just on
12 Thursday we received communication from the Government
13 indicating that it's more like 10 terabytes of video data.

10:48:50

14 And I don't know the actual amount of footage that needs to be
15 watched but just a rough calculation is probably around 14 to
16 16 months of actual time video. There's -- it's not possible,
17 Your Honor, for me to review anything like I need to with that
18 video in this time for June.

10:49:11

19 So what I'm telling the Court is I agreed with the
20 Government's position based on the facts they presented to us.
21 I'm not in disagreement with either making the case complex or
22 continuing it to May. I'm simply letting the Court know that
23 your September 25th date would certainly be one I would be
24 looking at, maybe even longer depending on what we get. I
25 understand there's a substantial amount more that we're going

10:49:30

10:49:51

1 to receive from the Government. But just the video alone is
2 problematic.

3 And then after other counsel has been heard, Your
4 Honor, I'd like to come back to that video issue because of
5 the way it's being disclosed and ask the Court for some
6 assistance with that as well.

10:50:03

7 Thank you.

8 MR. SELOW: Your Honor, Philip Seplow for
9 Mr. Fernandez, and I believe Mike Reeves has asked me to speak
10 for Mr. Ponce. I would agree with what Mr. Hamby said.

10:50:13

11 THE COURT: Miss Shoemaker, you're nodding your head
12 in agreement with something.

13 MS. SHOEMAKER: Judge, thank you. I do agree with
14 Mr. Hamby's comments regarding the discovery that is still
15 coming out at this point. We haven't even received it just
16 yet.

10:50:27

17 In addition, Judge, given my time I'm out of the
18 country from June 2nd until June 16th, I don't believe the
19 Government would even have time to finish their case, and that
20 would likely put things in a bind, if the Court gives me leave
21 to be out of the country during that time frame, to actually
22 finish our case before your July date.

10:50:43

23 So I do believe the September date is probably more
24 appropriate.

25 MR. EISENBERG: Your Honor, David Eisenberg for

10:50:56

1 Mr. Celis as well as Mr. Thompson.

2 I have to agree with the assessment of counsel
3 concerning the amount of time it's going to take to review
4 that discovery, although I will tell Court I am available in
5 May to try the case. It's just a matter of going through all 10:51:10
6 the discovery that's yet to come.

7 THE COURT: Well, what I'm starting to hear is if not
8 a ground swell a bit of a ground burble, anyway, for a
9 September 25 trial date. If that is the case, then the Court
10 will entertain an oral motion to continue the case further to 10:51:39
11 September 25.

12 MR. HAMBY: Your Honor, Joe Hamby for Mr. Carlon. I
13 move so orally.

14 THE COURT: All right. And just again, for the
15 record, I -- do any of the -- I realize this is probably -- 10:51:57
16 this is sufficient but do any of the defendants object to
17 continuing it to September 25?

18 All right. Hearing none -- and I do want to hear
19 from the Government with regard to that motion.

20 MR. HARRIGAN: Your Honor, we have no objection with 10:52:17
21 the September 25 trial date.

22 THE COURT: Very well.

23 It is ordered granting the defendants' motion to
24 continue the trial to September 25, and further excluding time
25 on the basis that the volume of discovery which has been 10:52:47

1 previously referenced in the papers filed with the Court and
2 as further expanded upon here this morning and the multiple
3 charges and the nature of those charges and the variations in
4 those charges and, of course, the number of defendants form
5 the basis for the Court's granting the continuance. And the 10:53:23
6 Court further finds that the ends of justice are served by
7 taking this action and outweigh the best interests of the
8 public and the defendant in a speedy trial.

9 Now, then, I will follow this with an order that
10 details the milestone deadlines for close of Government 10:53:50
11 discovery, those deadlines that are set forth in the
12 Government's motion.

13 I don't normally use a questionnaire but I do tend to
14 agree that in this case a limited questionnaire will be
15 appropriate, and we're going to need more lead time than what 10:54:28
16 the Government's earlier suggestion would indicate, but as we
17 approach that deadline I'll be looking at an abbreviated
18 questionnaire. I'm not expecting to do voir dire by
19 questionnaire but rather a targeted questionnaire that will be
20 very case specific regarding the length of time that may be 10:55:04
21 involved.

22 I realize if we're looking at a month from the
23 Government, and I have no idea, of course, how long the
24 defense case will be, but we'll want to qualify the
25 prospective jurors for their ability to serve for the length 10:55:27

1 of this trial and then case specific issues, because I venture
2 to say that a very high number of prospective jurors will have
3 heard something about this case in one form or another. So
4 I'll want a case-specific limited questionnaire that will deal
5 with that.

10:55:59

6 Now, these -- and I did intend to say at the outset
7 that I'm talking about a real trial date, and so September 25
8 is a real trial date and not just one that is sitting there as
9 a potential trial date.

10 I think I have covered my list. Let's see.

10:56:34

11 Does the Government have something else?

12 MR. HARRIGAN: Your Honor, we prepared the draft
13 order based on, I think, an order that had been provided by
14 your clerk. It's our understanding that the Court's practice
15 is to have one motions hearing.

10:56:50

16 In this case, I wanted to request, if possible, if
17 maybe when the Court drafts it we consider more than one
18 motions maybe to deal with the issues of wiretap and other
19 substantive motions far enough in advance of trial that that
20 will be able to determine in advance of trial, help us in
21 preparation what we're going to be able to put on for trial.

10:57:11

22 Does that make sense, Your Honor?

23 THE COURT: No.

24 MR. HARRIGAN: One motions hearing, then.

25 THE COURT: I still didn't -- one motion hearing is

10:57:25

1 what --

2 MR. HARRIGAN: Right.

3 THE COURT: I just didn't hear what -- well, we will
4 set -- we will set a deadline -- in fact, the deadline will
5 have much more lead time than what you were proposing. Back 10:57:39
6 when you were talking about a June trial date you were talking
7 about a motion deadline of May 1, and I was looking at more
8 like a three-month lead time between the motion deadline and
9 trial because, obviously, I need plenty of time to look at the
10 motions after they are fully briefed before ruling on them. 10:58:10

11 I think that's responsive to what you just said.

12 MR. HARRIGAN: I think so, Your Honor. There are
13 generally -- sometimes in San Diego we have a non-substantive
14 motions hearing date and a substantive motions hearing date,
15 and if the Court sets something three months in advance I 10:58:24
16 think we should be able to resolve all outstanding matters
17 well in advance of trial in order to know what we're
18 presenting at trial.

19 THE COURT: All right. Thank you.

20 Then you had something by way of -- I think you said 10:58:36
21 something about seeking the Court's guidance or some such
22 thing.

23 MR. HAMBY: Yes, Your Honor. We're looking for some
24 help.

25 The Government has indicated that to get the video 10:58:48

1 discovery that we were discussing earlier we should bring five
2 two-terabyte portable drives. That's a significant expense,
3 Your Honor, for -- certainly for my client and I'm sure for
4 other clients, and we're -- we'll try to work with the
5 Government but I'm just advising the Court of the problem and
6 seeing if there are some other ways that it could be handled.

10:59:09

7 So, for instance, maybe the Government could make it
8 available through a Service in the Cloud to where we would
9 have passwords and we could simply log on and view it. But I
10 don't have ten terabytes of data capacity in my office,
11 anyway.

10:59:26

12 THE COURT: I thought I heard, and my real time
13 suggests that is what I heard, Service in the Cloud? Is that
14 what you said?

15 MR. HAMBY: Yes, Your Honor, that is what I said.

10:59:39

16 THE COURT: And I'm supposed to know what that means.
17 I guess by virtue of having a computer screen up here I'm
18 supposed to know what you mean.

19 MR. HAMBY: I think there was a case, Your Honor, the
20 Court is presumed to have full knowledge of all Internet
21 issues.

10:59:50

22 MR. HARRIGAN: Your Honor, I believe what defense
23 counsel is referring to is there is significant video footage
24 in this case, video footage outside -- inside the gun stores
25 and outside auto shops that show people coming and going over

11:00:04

1 a period of time, sometimes over months, and so much of the
2 footage would not be relevant to each defendant and much of it
3 may not be relevant at all to the defendants depending on how
4 they view the footage's relevance.

5 What we would like to do is make it available on an 11:00:22
6 ad hoc basis where each defendant can determine what footage
7 they would like and they'd bring to us a two-terabyte drive
8 and we download the footage they request on that two-terabyte
9 drive and give it to them.

10 If any defendant was to want all the camera footage 11:00:36
11 throughout the entire period for each camera, it would require
12 five two-terabyte drives, which is significant and would in
13 the range of above \$500.

14 The way the Court may choose to handle this would be
15 to set up maybe a joint paralegal type situation where you 11:00:52
16 could assign certain people to handle this for the group as a
17 whole and download all this information and review it for each
18 defendant, whatever the Court's pleasure.

19 MR. SEPLow: Your Honor, I just --

20 THE COURT: Go ahead. 11:01:08

21 MR. SEPLow: Philip Seplow for Mike Reeves and for
22 Mr. Fernandez and Mr. Ponce.

23 Maybe some of the defense counsel will disagree with
24 me but I understand this is a conspiracy case and it's easy
25 for the Government to say we only have to see certain portions 11:01:24

1 but I think for most of our points of view when it's a
2 conspiracy case because of relevant conduct and because of
3 Pinkerton charges we have to be responsible for all the
4 content.

5 THE COURT: Well, it seems to me that with the 11:01:39
6 collection of talent in the courtroom, and particularly those
7 that are schooled in the nuances of being in the clouds, you
8 should be able to work out a protocol that is going to be
9 mutually agreeable. Quite often in discovery disputes I'm
10 fond of saying that any decision I make is going to be a lot 11:02:11
11 worse than what you can agree to, but this would seem to be a
12 classic example of that.

13 But if you are unable to work something out, then
14 seek a further hearing from the Court, and if we're going to
15 have -- and if it comes to that, then I would expect to have 11:02:30
16 some type of filing ahead of time that posits the alternatives
17 for the Court to consider so that we don't just walk into a
18 discussion of terabytes and clouds without some guidance to
19 the Court in advance.

20 All right. Anything further? 11:02:57

21 Very well. Then -- Mr. Paige, you're moving as if
22 there is.

23 MR. PAIGE: Mark Paige, Your Honor, for Erick Avila.

24 My question is simply whether it makes sense to
25 address today what the status of the motion is with respect to 11:03:17

1 the intervenor. My -- not intervenor but Mr. Charlton's
2 office representing the Terry family with regard to victim
3 status.

4 The previous AUSA had filed a motion opposing it. I
5 know myself and some others filed joinders with that. I also
6 joined in, I believe, a response filed by Mr. Simpson.

11:03:44

7 Subsequently, the current prosecution team filed something
8 that kind of said they'd work something out with
9 Mr. Charlton's office but if that doesn't work out then there
10 they're really not victims or something like that. Then I
11 believe Mr. Charlton's office filed something. So --

11:04:12

12 THE COURT: What's your question?

13 MR. PAIGE: The question is, where does that stand
14 now? And particularly, with respect to the current
15 prosecution team, in their filing they said they were -- they
16 were requesting to withdraw the previous filing which some of
17 us joined in. So should that be withdrawn, what would then be
18 the status of the joinders; would it survive because of those
19 of us who had joined it and what are we doing with that?

11:04:25

20 THE COURT: Well, I don't know what you're doing with
21 it but it is currently -- it is currently -- I am fully aware
22 of the pendency of these matters but I'm not prepared to take
23 any action today.

11:04:44

24 MR. PAIGE: Right. I guess I'm just curious if
25 there's need to file anything additional by those of us who

11:05:02

1 joined in the motion that's being sought to be withdraw or if
2 the Court, when considering it, if it does allow that prior
3 filing by the Government to be withdrawn, if it will then
4 allow us time to file something else.

5 THE COURT: Yeah. I did not go back and review 11:05:21
6 the --

7 MR. PAIGE: Okay.

8 THE COURT: -- status of that in anticipation of
9 today's hearing, so I'm not able to provide you any guidance
10 today. 11:05:30

11 MR. PAIGE: Thank you, Your Honor.

12 THE COURT: All right. Then we're in recess. Thank
13 you.

14 (Proceedings recessed at 11:05 a.m.)
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C E R T I F I C A T E

I, DAVID C. GERMAN, Official Court Reporter, do hereby
certify that I am duly appointed and qualified to act as
Official Court Reporter for the United States District Court
for the District of Arizona.

I FURTHER CERTIFY that the proceedings and testimony
reported by me on the date specified herein regarding the
afore-captioned matter are contained fully and accurately in
the notes taken by me upon said matter; that the same were
transcribed by me with the aid of a computer; and that the
foregoing is a true and correct transcript of the same, all
done to the best of my skill and ability.

DATED at Phoenix, Arizona, this 13th day of December,
2011.

s/David C. German
DAVID C. GERMAN, RMR, CRR